

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

AYLUS NETWORKS, INC.,

Plaintiff,

v.

APPLE INC.,

Defendant.

Case No. 13-cv-04700-EMC

**ORDER DENYING DEFENDANT'S
MOTION FOR ATTORNEY'S FEES**

Docket No. 257

I. INTRODUCTION

Plaintiff Aylus Networks, Inc. filed the instant suit against Defendant Apple, Inc., alleging that Apple's AirPlay feature infringed claims 2 and 21 of U.S. Patent No. RE44,412 ('412 patent). *See* Docket No. 37 (Second Amended Complaint) (SAC) at ¶ 11. The '412 patent describes a media streaming architecture that allows a user to coordinate the transport of media content from an internet-based media server to a physically proximate media renderer. *Id.* at ¶ 12.

On January 21, 2016, the Court granted Apple's motion for summary judgment, finding non-infringement. Docket No. 245 (Summary Judgment Order) (Ord.). Based on the claim language, the patent specification, Aylus's preliminary response to Apple's *inter partes* review petition of the '412 patent, and the Patent Trial and Appeal Board's (PTAB) adjudication of Apple's petition, the Court found that claims 2 and 21 require that only the Control Point Proxy (CPP) logic negotiates media content delivery, in contrast to claims 1 and 20 which require that both the CPP and Control Point (CP) logic are invoked to negotiate media content delivery. *Id.* at 10. As AirPlay involved steps in which the CP logic was invoked to negotiate media content delivery, the Court found that there was no infringement, entitling Apple to summary judgment. *Id.* at 12.

Apple now moves for attorney's fees under the Patent Act, which permits "[t]he court in exceptional cases [to] award reasonable attorney fees to the prevailing party." 35 U.S.C. § 285; Docket No. 257 (Mot.). In total, Apple requests attorney's fees in the amount of \$2,009,797.80 and nontaxable costs in the amount of \$23,480.81 for work performed after May 29, 2015. Apple's motion came on for hearing before the Court on March 10, 2016. For the reasons stated below, the Court **DENIES** Apple's motion for attorney's fees.

II. BACKGROUND

The '412 patent describes two scenarios, one which involves three primary components – the Control Point (CP), the Media Server (MS), and the Media Renderer (MR) – and one which involves four primary components – the CP, MS, MR, and the Control Point Proxy (CPP). In the first scenario, the CP queries the MS for a directory of content, and negotiates content delivery within the MS, including instructing the MS to deliver content to the MR. Docket No. 183 (Buergi Dec.), Exh. 6 (IPR Decision) at 4-5. The CP also negotiates media rendering with the MR, instructing the MR to start expecting content from the MS and to present such. *Id.* at 5. The MS then delivers media content to the MR. *Id.* In the second scenario, the CP is located in a wide area network via the "Service Provider," while the CPP is within the "User Premises." *Id.* at 5. There, "[t]he CP communicates with the MS, the CPP communicates with the MR, and the CP and CPP communicate with each other." *Id.* at 5-6.

At issue in this litigation were dependent claims 2 and 21. Claim 2 depends from claim 1, while claim 21 depends from claim 20. In relevant part, claim 1 is:

[a] method of controlling and delivering media content from a media server (MS) to a media renderer (MR) utilizing a wide area network for control, comprising the acts of . . . invoking the CPP logic and the CP logic to cooperatively negotiate media content delivery between the MS and the MR if one of the MS and MR are not in communication with the UE [user endpoint] via a local wireless network

Buergi Dec., Exh. 1 ('412 Patent) col. 24 ll. 37-39, 58-61. Claim 2, in turn, is "[t]he method of claim 1, wherein the CPP logic is invoked to negotiate media content delivery between the MS and the MR if the MS and MR are both in communication with the UE (user endpoint) via a local

wireless network.” *Id.* at col. 24 ll. 64-67.

Similarly, Claim 20 is:

[a] method of controlling and delivering media content from a media server (MS) to a media renderer (MR) utilizing a wide area network for control, where a user endpoint (UE) is provisioned with control point proxy (CPP) logic that includes (i) logic to negotiate media content delivery with at least one of the MS and the MR, (ii) logic to cooperate with network control point (CP) logic to negotiate media content delivery between the MS and the MR, and (iii) video play controls to control a presentation of content provided by the MS and rendered by the MR, wherein the CPP logic resides in the UE and serves as a first proxy, comprising the acts of . . . invoking the CPP logic and the CP logic to cooperatively negotiate media content delivery between the MS and the MR if one of the MS and MR are not in communication with the UE via a local wireless network; and

Id. at col. 25 ll. 55-65, col. 26 ll. 8-11. Claim 21, like claim 2, is “[t]he method of claim 20, wherein the CPP logic is invoked to negotiate media content delivery between the MS and the MR if the MS and MR are both in communication with the UE via a local wireless network.” *Id.* at col. 26 ll. 14-17.

Apple filed a Petition for *inter partes* review of all claims (*i.e.*, claims 1-33) of the ‘412 patent, arguing that the claims were obvious over prior art, specifically the UPnP (Universal Plug and Play) Design book. IPR Decision at 2-3. In its preliminary response to Apple’s Petition, Aylus explained that the challenged claims require “determining the ‘network context’ of the UE (*i.e.*, the networks available to the UE) and the ‘network connectivity’ of the MS and MR (*i.e.*, the networks through which the UE can communicate with the MS and MR). Buergi Dec., Exh. 4 (IPR2014-01565 Resp.) at 4; Exh. 5 (IPR2014-01566 Resp.) at 4. For example:

Specifically, for claims 1 and 20, if . . . it is determined that “one of the MS and MR are not in communication with the UE via a local wireless network” the “CPP logic and the CP logic are both invoked[”] and will “cooperatively negotiate media content delivery between the MS and the MR.” If, however, “the MS and MR are both in communication with the UE via a local wireless network, then **only** “the CPP is invoked to negotiate media content delivery between the MS and the MR.” [Claims 2 and 21].

IPR2014-01565 at 34-35 (emphasis added); IPR2014-01566 at 33 (emphasis added); *see also* IPR2014-01565 Resp. at 4; IPR2014-1566 Resp. at 4 (if neither (or both) the MS or the MR is in

communication with the UE via a local wireless network, “the challenged dependent claims require that only the control point logic (or only the control point proxy logic) be invoked . . .”). Thus, Aylus argued that “the challenged claims require selectively invoking the CP logic and/or CPP logic based on whether the MS and/or MR can communicate with the UE through the local network.” IPR2014-01565 Resp. at 4; IPR2014-1566 Resp. at 4. The purpose of this selective invocation based on what network is available is “to reduce the ‘wireless spectrum-consuming communications between the CP, media servers and media renderers.” IPR2014-01565 Resp. at 35; *see also* IPR2014-01566 Resp. at 35 (explaining that the UPnP “fail[s] to disclose at least two limitations of each of the challenged claims: provisioning a serving node in the wide area network with CP logic; and determining a network context of the UE and a network connectivity of the MS and MR in order to choose the least-cost routing for negotiating media content delivery.”).¹

The Patent Trial and Appeal Board (PTAB) initiated review of claims 1, 3, 5-20, 22, and 24-33, but not claims 2, 4, 21, and 23. IPR Decision. at 2. For the claims that the PTAB instituted *inter partes* review, the PTAB found that Apple would likely prevail with respect to those claims being obvious over the UPnP Design book. *Id.* at 14. However, with respect to dependent claims 2, 4, 21, and 23, the PTAB explained that Apple’s Petition had relied on the same evidence to show that the UPnP design met the limitation of claims 1 and 20 (which require that the CP and CPP logic cooperatively negotiate media content delivery between the MS and MR) as it did to show that the UPnP design met the limitations of claims 2 and 21. *Id.* at 17-18. In short, the PTAB found that “[i]t [wa]s unclear from the Petition how UPnP design allegedly meets the *different* limitations of dependent claims 2 [and] 21 . . . in which . . . the CPP logic *exclusively* handles the negotiation of media content delivery between the MS and MR.” *Id.* at 18 (emphasis added).

Following the PTAB’s decision, on May 29, 2015, Aylus dismissed with prejudice its

¹ Aylus argues that this key purpose of reducing use of the wireless spectrum-consuming communications between the CP, media servers, and media renderers supports Aylus’s argument that only the CPP is required to be invoked, but the CP can still be involved. Docket No. 260 (Opp.) at 9. This purpose is not at-odds with the Court’s construction of claims 2 and 21; by only involving the CPP, claims 2 and 21 eliminate the wireless spectrum-consuming communication between the CP, MS, and MR.

1 infringement claims except as to dependent claims 2 and 21. Docket No. 131. The parties then
 2 moved for summary judgment in October 2015, with Apple asserting that it was entitled to
 3 summary judgment of non-infringement because it did not practice the limitation “The CPP is
 4 invoked to negotiate media content delivery between the MS and the MR,” as the CP was also
 5 involved in media content delivery. Docket No. 182 (Apple MSJ) at 5. Aylus in turn argued that
 6 barring any involvement by the CP logic would improperly add a negative limitation on the claim.
 7 Docket No. 205-4 (Aylus MSJ Opp.) at 3. This was the first time the parties ever asked the Court
 8 to construe the claim term. *See* Apple MSJ at 5-6.

9 The Court ultimately agreed with Apple, holding that claims 2 and 21 should be read as
 10 requiring that *only* the CPP logic be invoked to negotiate media content delivery, whereas AirPlay
 11 operated by using both the CPP logic and the CP logic to negotiate media content delivery. Ord.
 12 at 6. In so ruling, the Court looked at the claim language, finding that the independent and
 13 dependent claims were distinguishable by whether both the CPP logic and the CP logic were
 14 invoked to negotiate media content delivery (independent claims 1 and 20) or if only the CPP
 15 logic was invoked to negotiate media content delivery (dependent claims 2 and 21), depending on
 16 whether the MS and MR are in communication with the UE. *Id.* at 7. The Court explained that to
 17 read dependent claims 2 and 21 as encompassing both the invocation of CPP logic only and the
 18 invocation of CPP logic and CP logic would render the distinction meaningless. *Id.*

19 The Court further found that this distinction was supported by the patent specification, as
 20 well as Aylus’s preliminary response to Apple’s Petition for *inter partes* review. *Id.* at 8-9. For
 21 example, Aylus had explained that “the challenged claims require selectively invoking the CP
 22 logic and/or CPP logic based on whether the MS and/or MR can communicate with the UE
 23 through the local network.” IPR2014-01565 Resp. at 4; IPR2014-1566 Resp. at 4. Thus, for
 24 claims 1 and 20, if either the MS or MR are not in communication with the UE via a local wireless
 25 network, then both the CPP logic and CP logic are invoked and will cooperatively negotiate media
 26 content delivery between the MS and the MR. But if “the MS and MR are both in communication
 27 with the UE via a local wireless network, then **only** the CPP is invoked to negotiate media content
 28 delivery between the MS and the MR.” IPR2014-01565 at 35 (emphasis added); IPR2014-01566

at 33 (emphasis added). Relying on this distinction, the PTAB had denied Apple’s Petition for *inter partes* review of dependent claims 2 and 21 because Apple had relied on the same evidence to show the UPnP design met all of the claims’ limitations, even though the limitations of claims 1 and 20 were different from claims 2 and 21. IPR Decision at 18.

During the hearing, Aylus attempted to argue that even if the claim requires that only the CPP logic is invoked to negotiate media content delivery, the CP logic can be involved as a “passive” actor while the CPP is the exclusive active agent. *See* Docket No. 232 at 46:23-47:10. However, the Court found that even accepting this argument, Aylus’s argument that the CP was not invoked during AirPlay was “at odds with the testimony of Aylus’s own expert,” who had testified that steps which *only* required action by the CP were part of the negotiation of media content delivery. Buergi Dec., Exh. 8 at 139:3-17, 139:22-141:12, 141:17-142:17, 142:23-144:1, 152:3-13. Thus, the Court determined that Apple AirPlay did not infringe on dependent claims 2 and 21, entitling Apple to summary judgment.

III. DISCUSSION

A. Legal Standard

35 U.S.C. § 285 states: “The court in exceptional cases may award reasonable attorney fees to the prevailing party.” As defined by the Supreme Court, “exceptional” is defined by its ordinary meaning, *i.e.*, “uncommon, rare, or not ordinary.” *Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1756 (2014) (internal quotations omitted). Thus, an “‘exceptional’ case is simply one that stands out from others with respect to the substantive strength of a party’s litigating position (considering both the governing law and the facts of the case) or the unreasonable manner in which the case was litigated.” *Id.* The district court “may determine whether a case is ‘exceptional’ in the case-by-case exercise of their discretion, considering the totality of the circumstances.” *Id.* For example, the district court “could consider a ‘nonexclusive’ list of ‘factors,’ including frivolousness, motivation, objective unreasonableness (both in the factual and legal components of the case) and the need in particular circumstances to advance considerations of compensation and deterrence.” *Id.* at 1756 fn. 6. The district court should not, however, use “sanctionable conduct” as the appropriate benchmark; instead, “a district

1 court may award fees in the rare case in which a party's unreasonable conduct--while not
 2 necessarily independently sanctionable--is nonetheless so 'exceptional' as to justify an award of
 3 fees." *Id.* at 1757.

4 For example, in *MarcTec, LLC v. Johnson & Johnson*, the Federal Circuit upheld the
 5 district court's finding of an "exceptional" case and the award of attorney and expert fees. 664
 6 F.3d 907, 910 (Fed. Cir. 2012).² There, the patents at issue were "directed to a surgical implant in
 7 which a polymeric material is bonded by heat to an expandable implant, where the polymer
 8 includes a therapeutic agent such as an antibiotic." *Id.* The accused infringing product was a stent
 9 which had a drug/polymer coating that was sprayed onto the stent at room temperature and bonded
 10 at room temperature, not by the application of heat. *Id.* at 912. However, in its claim construction
 11 order, the district court construed the term "bonded" to require bonding by the application of heat,
 12 and the terms "surgical device" and "implant" to exclude stents. *Id.* The district court's
 13 construction was based on prosecution disclaimers, in which the plaintiff had limited his claims to
 14 heat bonding to overcome another patent, and disclaimed stents to obtain allowance. *Id.* at 913.

15 Moving for summary judgment, the defendant argued non-infringement based on: (1) the
 16 patents required bonding by heat, and (2) the accused product was a stent. *Id.* In response, the
 17 plaintiff presented expert testimony that the bonding did occur by heat, and argued that nothing in
 18 the prosecution history precluded coverage of stents. *Id.* The district court disagreed with the
 19 plaintiff on both points. First, it found that the expert's theory that bonding occurred by heat was
 20 untested, unreliable, and irrelevant, and thus inadmissible under *Daubert*. *Id.* Second, it found
 21 that the plaintiff had disclaimed stents during prosecution. *Id.* at 914. On these two bases, the
 22 district court granted summary judgment.

23 The defendant then moved for a finding that the case was exceptional and the grant of
 24

25 ² *MarcTec, LLC* precedes the Supreme Court's decision in *Octane Fitness*; prior to *Octane*
 26 *Fitness*, the Federal Circuit applied a higher standard for an "exceptional" case, requiring either
 27 material inappropriate conduct or a finding of both (1) the litigation was brought in subjective bad
 28 faith and (2) the litigation was objectively baseless. 664 F.3d at 916; *see also Octane Fitness*, 134
 S. Ct. at 1754. The Supreme Court criticized this standard as unduly rigid and "impermissibly
 encumber[ing] the statutory grant of discretion to district courts." *Octane Fitness*, 134 S. Ct. at
 1755.

1 attorney's fees. The district court agreed that the case was exceptional, finding that the
 2 infringement allegations were baseless and frivolous because the plaintiff had ignored the
 3 specification and prosecution history in its claim construction argument. *Id.* at 915. The district
 4 court further found that the plaintiff had misrepresented both the law of claim construction and the
 5 constructions adopted by the court, as well as relying on expert testimony that did not meet the
 6 *Daubert* standards. *Id.* For these reasons, the district court found -- and the Federal Circuit
 7 affirmed -- that the case was exceptional, warranting the award of fees. *Id.* at 920.

8 By contrast, the district court in *Vasudevan Software, Inc. v. Microstrategy, Inc.* declined
 9 to find the case exceptional. Case No. 11-cv-6637-RS, 2015 WL 4940635, at *1. There, the
 10 plaintiff's patents were related to business intelligence software, a federated database system that
 11 retrieves data from disparate databases to create and display to users a data structure called an
 12 online analytical processing (OLAP) cube. *Id.* During the litigation, the primary issue was the
 13 meaning of "disparate databases." The plaintiff argued that the term meant "incompatible
 14 databases having different schemas." *Id.* at *2. The defendant argued for a definition that was
 15 almost word-for-word what the plaintiff had stated before the PTO, namely that disparate
 16 databases were "databases having an absence of compatible keys or record identifier (ID) columns
 17 of similar value or format in the schemas or structures of the database that would otherwise enable
 18 linking data within the constituent databases."³ *Id.* The parties did not dispute that the
 19 defendant's product had compatible keys, and that under the defendant's construction, there would
 20 be no infringement. *Id.* The district court agreed that the plaintiff's description before the PTO
 21 was binding, and found that the defendant's claim construction was correct. *Id.*

22 Following the court's claim construction order, the parties disputed whether the
 23 construction was to be interpreted disjunctively or conjunctively, with the plaintiff filing an expert
 24 report asserting an infringement theory based on a disjunctive interpretation. *Id.* This led to the
 25 district court issuing a clarification order which adopted the defendant's conjunctive interpretation,

26
 27 ³ The plaintiff's exact statement to the PTO was that the term "disparate" "refers to the absence of
 28 compatible keys or record identifier columns of similar value or format in the schemas or
 structures of the database that would otherwise enable linking data within the constituent
 databases."

1 such that disparate databases are “databases having an absence of compatible keys *and* an absence
2 of record identifier columns of similar value *and* an absence of record identifier columns of
3 similar format in the schemas or structures that would otherwise enable linking data.” *Id.* at *3.

4 The plaintiff stipulated to non-infringement, and summary judgment of invalidity was granted. *Id.*

5 The defendant moved for attorney’s fees, arguing that the plaintiff’s decision to sue was
6 exceptional when the plaintiff had explained during patent prosecution that its invention was
7 distinguishable from prior art because the plaintiff’s technology did not require the databases to
8 share common keys. *Id.* at *4. The district court disagreed, distinguishing cases like *MarcTec*
9 where the definitional dispute -- heat or no heat -- was “simple and binary.” *Id.* In contrast, the
10 “disparate databases” definition was a complex and multifaceted question, and the plaintiff had
11 mounted a non-frivolous argument that statements made at prosecution did not yield a single clear
12 answer by relying on statements made during prosecution other than those the court ultimately
13 held to be dispositive. *Id.* Furthermore, after the court issued its claim construction order, the
14 plaintiff did not rely on its rejected proposed construction, but urged a disjunctive reading. *Id.*
15 The court concluded that the fact that the plaintiff “pursued a facially plausible, albeit feebly
16 supported, construction in lieu of stipulating to non-infringement does not rise to conduct
17 warranting a fee award.” *Id.* at *5. The court also noted that on appeal, the Federal Circuit had
18 “grappled squarely with [the plaintiff’s] arguments in reaching its decision to affirm this Court’s
19 adoption of a conjunctive construction.” *Id.* Thus, “[t]hat [the plaintiff] advanced positions based
20 on a reading of the prosecution history ultimately found to be untenable does not render its case
21 wholly frivolous, or necessarily imply it acted in bad faith, such that its conduct should be deemed
22 ‘exceptional.’” *Id.*

23 Further reinforcing this ruling was the manner of litigation. As an initial matter, the
24 district court noted that “[a]lthough *Octane* ostensibly liberalized the standard for fee shifting, and
25 clearly reduced the prevailing party’s burden from clear and convincing to a preponderance of the
26 evidence, post-*Octane* decisions awarding fees have generally cited egregious behavior.” *Id.*
27 Applied to the case, the district court found that while the plaintiff “engaged in numerous
28 questionable and overly aggressive litigation tactics[, o]n balance, however, such behavior may

1 reasonably be interpreted as part of [the plaintiff's] good-faith effort to advance its position in the
2 face of [the defendant's] vigorous and equally fervent defense.” *Id.* at *6. Taken together, the
3 district court held that the plaintiff's manner of litigation was not sufficiently egregious to justify
4 fee-shifting, and denied the motion for attorney's fees.

5 B. Application

6 In the instant case, Apple seeks attorney's fees and nontaxable costs for the period after
7 May 29, 2015, “after which there can be no doubt that Aylus had no objectively reasonable basis
8 for continuing its patent infringement suit against Apple.” Mot. at 2. Specifically, Apple contends
9 that in January 2015, Aylus informed the PTAB in its preliminary response to Apple's Petition for
10 *inter partes* review that “only” the CPP logic is invoked to negotiate media content delivery under
11 claims 2 and 21. *Id.* On May 11, 2015, Apple provided written discovery stating that the accused
12 negotiation of media content delivery invoked both the CPP logic and the alleged CP logic. *Id.*
13 Finally, on May 29, 2015, Aylus dismissed with prejudice its claims under the ‘412 patent except
14 for dependent claims 2 and 21. *Id.* Thus, Apple argues that Aylus had no “objectively reasonable
15 basis to assert claims 2 and 21 as of May 11, 2015, [and] as of May 29, 2015 Aylus had no other
16 infringement allegations against Apple as to the remaining asserted claims.” *Id.* at 3. For these
17 reasons, Apple requests that the Court find this case exceptional, due to the substantive weakness
18 of Aylus's case.⁴ *Id.* at 6.

19 The Court finds that, although a close question, this is not an exceptional case. The instant
20 case is more comparable to *Vasudevan Software* than *MarcTec, LLC*; whether “the CPP logic is
21 invoked to negotiate media content delivery” was not a simple question, but presented a more
22 complex question with which this Court grappled. Specifically, Aylus argues that it had at least a
23 plausible or reasonable argument that claims 2 and 21 permit the CP to be involved, in that claims
24

25 ⁴ Apple also contends that Aylus never articulated a factual basis for an infringement finding
26 under the correct construction of the term “the CPP is invoked.” Reply at 9. It is unclear why
27 Aylus should be required to allege a factual basis for an infringement finding under this
28 construction when the parties vigorously disputed at summary judgment what the construction
should even be; if Aylus had prevailed in showing that the CP could be involved, then it would not
have been required to establish a theory of infringement under a construction where only the CPP
can be invoked to negotiate media content delivery.

2 and 21 on their face only require that the CPP be invoked but do not explicitly preclude CP logic from being invoked. Docket No. 260 (Opp.) at 4. While the Court ultimately rejected Aylus's construction, Aylus's construction was not plainly precluded by the express language of claims 2 and 21.

While Aylus's construction is considerably weakened, among other things, by its statements before the PTAB, in which it stated that for claims 2 and 21, where "'the MS and MR are both in communication with the UE via a local wireless network,' then only 'the CPP is invoked to negotiate media content delivery between the MS and the MR,'" (*see* IPR2014-01565 Resp. at 35; IPR2014-01566 Resp. at 33), like the plaintiff in *Vasudevan Software*, its argument was not completely at odds with that statement. Aylus argued herein that the CP logic could be involved but not necessarily "invoked," such as where the CPP logic makes use of the CP logic for the media delivery but the CPP logic acts as the exclusive active agent. *See* Aylus MSJx Opp. at 4; Ord. at 11. While the argument was weak, it was not completely frivolous. Thus, like the plaintiff's losing argument in *Vasudevan Software*, which was "facially plausible, albeit feebly supported," Aylus's argument is not conduct that must clearly be deemed "exceptional." 2015 WL 4940635, at *5; *see also Site Update Solutions, LLC v. Accor N. Am., Inc.*, Case No. 5:11-cv-3306-PSG, at *4, 7, 11 (N.D. Cal. Feb. 11, 2015) (declining to find case exceptional where, among other things, the plaintiff's erroneous claim construction was based on a misinterpretation of Federal Circuit case law, and the plaintiff's failure to include the Table of Files in its proposed construction "strains credibility"); *Digital Reg of Tex., LLC v. Adobe Sys., Inc.*, No. C-12-1971 CW, 2015 WL 106226, at * (N.D. Cal. Mar. 9, 2015) (declining to find case exceptional where the court had found in three instances that the plaintiff's proposed claim constructions were inconsistent with the specification and prosecution history and where the plaintiff relied on expert testimony that was excluded under *Daubert*); *Kreative Power, LLC v. Monoprice, Inc.*, Case No. 14-cv-2991-SI, 2015 WL 1967289, at * (N.D. Cal. Apr. 30, 2015) (declining to find case exceptional where the court devoted nearly five pages of its summary judgment order to analyze the plaintiff's allegation of infringement and rebuttal to prosecution history estoppel, although the court was ultimately unpersuaded).

In exercising its discretion in not finding this an exceptional case, considering the totality of circumstances, the Court notes that many of the “post-*Octane* decisions awarding fees have generally cited egregious behavior.” *Vasudevan Software*, 2015 WL 4940635, at *5. *See, e.g., Home Gambling Network, Inc. v. Piche*, No. 2:05-cv-610-DAE, 2014 WL 2170600, at *9 (D. Nev. May 22, 2014) (finding case exceptional in part because the plaintiffs engaged in patent misuse by “first tr[ying] to limit Defendants’ usage of something that was never owned by [the plaintiffs], and then attempt[ing] to sue for infringement of steps of the patent that they voluntarily relinquished years earlier”); *IPVX Patent Holdings, Inc. v. Voxernet LLC*, Case No. 5:13-cv-01708 HRL, 2014 WL 5795545, at *5-6 (N.D. Cal. Nov. 6, 2014) (finding the case exceptional because the plaintiff never expected to prevail on literal infringement, proposed term constructions that were “absurd and farfetched,” served a “boilerplate complaint on dozens of defendants,” may not have performed presuit investigation, served discovery requests that had nothing to do with the accused product, and did not expend the resources necessary to support its positions on infringement). Here, Apple does not contend that Aylus engaged in any egregious behavior beyond relying on a claim construction that the Court ultimately rejected. There is no evidence (or even an allegation) of improper motivation or bad faith, and no need to deter Aylus from future litigation. Thus, the absence of egregious behavior, while not dispositive, also weighs against awarding fees in this case. *See H-W Tech., Inc. v. Overstock.com, Inc.*, Civil Action No. 3:12-CV-0636-G (BH), 2014 WL 4378750, at *7 (N.D. Tex. Sept. 3, 2014) (denying motion for § 285 attorney’s fees because “[a]side from the legal arguments that ultimately did not prevail, Defendant does not allege any unreasonable conduct or delay caused by Plaintiff. There are no other factors that merit an award of attorneys’ fees.”).

///

///

///

///

///

///

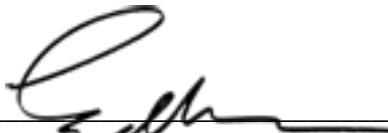
1 **IV. CONCLUSION**

2 For the reasons stated above, the Court finds that the instant case is not so exceptional that
3 it “stands out from others with respect to the substantive strength of a party’s litigation position
4 (considering both the governing law and the facts of the case) or the unreasonable manner in
5 which the case was litigated.” *Octane Fitness, LLC*, 134 S. Ct. at 1756. The Court therefore
6 **DENIES** Apple’s motion for attorney’s fees.

7 This order disposes of Docket No. 257.

8
9 **IT IS SO ORDERED.**

10
11 Dated: March 30, 2016

12 
13 EDWARD M. CHEN
14 United States District Judge
15
16
17
18
19
20
21
22
23
24
25
26
27
28